No. 95-676

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DOMINGO GUEVARA,

Petitioner,

v.

MARITIME OVERSEAS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF MARITIME OVERSEAS CORPORATION

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QUESTION PRESENTED

Whether a seaman can recover unliquidated punitive damages from a shipowner for an arbitrary and capricious failure to make timely payments of maintenance and cure in an action brought pursuant to the Jones Act and general maritime law in the wake of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)?

RULE 29.1 STATEMENT

Respondent Maritime Overseas Corporation has no parent companies or any subsidiaries that are not wholly owned.

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STATEMENT OF THE CASE

Petitioner Domingo Guevara ("Guevara") filed suit against respondent Maritime Overseas Corporation ("MOC") under the Jones Act, 46 U.S.C. App. § 688(a), and general maritime law for injuries he sustained on May 29, 1990. Guevara also sought punitive damages for MOC's failure to pay timely maintenance.

After his injury on May 29, Guevara remained aboard the vessel until August 31, 1990, without complaint. He first saw a physician in September of 1990. Despite the doctor's recommendation for surgery, Guevara requested a doctor's release for light duty. He then returned to his native Colombia until February of 1991. Thereafter, he again sought medical treatment. On July 18, 1991, he reached maximum medical cure. Pursuant to the collective bargaining agreement, his medical expenses were paid by the union from a fund to which MOC contributed. Therefore, no issue regarding cure expense was left for the jury to decide.

Guevara's first contact with MOC after he left the vessel in August was his counsel's letter of February 5, 1991, to MOC's trial counsel requesting maintenance. Guevara had surgery on February 11, 1991, just six days after his first request for maintenance. Guevara's counsel also sent letters requesting maintenance to MOC's trial counsel on February 26, 1991, April 4, 1991, and June 7, 1991. On July 28, 1991, MOC forwarded to Guevara a maintenance check for $448.00. Counsel for Guevara sent letters to MOC's trial counsel requesting additional maintenance on August 21, 1991, and January 31, 1992. On January 31, 1992, MOC's trial counsel forwarded a check for $1,344.00, dated October 31, 1991, to counsel for Guevara.

Because the parties stipulated that MOC's trial counsel received the letters and the court believed the letters to be prejudicial, their contents were withheld from the jury. Consequently, the jury awarded punitive damages based only upon the dates of the letters and the amounts and dates of the checks paid to Guevara. Guevara presented no evidence of any aggravation of his condition caused by the delay in payment of maintenance.

The jury found that MOC acted "arbitrarily and capriciously" in failing to pay maintenance on a timely basis. The jury awarded Guevara $60,000.00 in punitive damages because MOC was late in paying $1,792.00 in maintenance benefits. Petitioner did not seek recovery for attorney's fees.

A panel of the Fifth Circuit Court of Appeals upheld the damage awards in a per curiam opinion on September 30, 1994. On November 4, 1994, the court, on its own

motion, agreed to reconsider en banc whether a seaman could recover unliquidated punitive damages. On July 26, 1995, the Fifth Circuit overturned the panel decision on that issue.

REASONS FOR DENYING THE WRIT

Summary of Argument

Certiorari should be denied because the lower courts are satisfactorily resolving the question presented without the need for further guidance from this Court at the present time.

Before this Court's opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and its language limiting the recoverable damages in a general maritime claim to those recoverable under the Jones Act, a conflict existed among the circuits on the question of a seaman's recovery of unliquidated punitive damages for a shipowner's arbitrary and capricious failure to provide timely maintenance and cure. Since *Miles*, the circuit courts that have decided the question are in agreement that a seaman's remedy for a shipowners' failure to provide maintenance and cure is limited to attorney's fees. Therefore, no conflict exists among the circuits that have applied the teaching of *Miles* in the maintenance and cure context.

Although confusion may have existed before *Miles*, the logic and analytical framework of *Miles* have provided the guidance necessary for the circuits to decide the issue uniformly. As a result, it appears those courts

that decided cases before *Miles*, in conflict with the decision below, would be unlikely to adhere to their pre-*Miles* views if they were given an opportunity to reconsider their rulings.

Certiorari also should be denied because the unanimous en banc Fifth Circuit properly concluded that a seaman cannot recover unliquidated punitive damages from a shipowner for the failure to make timely payments of maintenance and cure. *Miles* supports this conclusion. Moreover, contrary to petitioner's arguments, no prudential factors mandate the recovery of punitive damages for a shipowner's failure to pay maintenance and cure, even if *Miles* did permit that result.

I.

NO CONFLICT EXISTS SUFFICIENT TO JUSTIFY THIS COURT'S ATTENTION

The current position in most circuits is entirely consistent with the Fifth Circuit's decision in this case. The two courts of appeals to address the impact of this Court's decision in *Miles* both hold that a seaman may not recover unliquidated punitive damages in a maintenance and cure action. The First and Eleventh Circuits, along with the Alaska Supreme Court, have held to the contrary, but those cases all pre-date *Miles*. There is good evidence that all of those courts most likely would agree with the decision below if they were to rule on the issue today. At the very least, this Court should wait until these dissenting courts have had the chance to re-examine their pre-*Miles* decisions. If they join the emerging consensus, as appears likely, any conflict will be resolved without

this Court's intervention. If they adhere to their prior views, there will be ample time for this Court to step in then and provide further guidance.

A. Recovery of Unliquidated Punitive Damages: The Positioning of the Circuits

In the decision below, the Fifth Circuit, en banc, unanimously held that a Jones Act seaman cannot recover unliquidated punitive damages for a shipowner's failure to pay maintenance and cure. The Ninth Circuit reached the same conclusion in *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (CA9 1995).[1] Both the decision below and *Glynn* limit a seaman's recovery to attorney's fees and, more importantly, both were decided after this Court's opinion in *Miles*.

The Second[2] and Third Circuits[3] also have held that a seaman's recovery is limited to attorney's fees, although the courts have described the recovery of attorney's fees as "punitive damages." *Kraljic*, 575 F.2d at 416. Petitioner argues that the position of the Second and Third Circuits

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[1] The seaman in *Glynn* has petitioned for certiorari on the question presented in this case and on a separate procedural issue. No. 95-691. We believe certiorari should be denied in *Glynn* (at least with respect to question 1) for the same reasons that certiorari should be denied in the present case. But if the Court wishes to decide the issue now, we recognize that the present case offers a better vehicle than *Glynn*.

[2] *See, e.g., Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 416 (CA2 1978).

[3] *Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074 (CA3 1995).

conflicts with that of the Fifth and Ninth. Petition ("Pet.") at 5. However, the distinction between the recovery of attorney's fees and the recovery of punitive damages limited to attorney's fees, in practice, is nothing more than an exercise in semantics. Indeed, the court below found it unnecessary to decide if attorney's fee awards in this context are "punitive" or "compensatory." *See* 59 F.3d at 1503, Pet. at D-16.

Petitioner also argues that the Fourth and Sixth Circuits are in conflict with the decision below, Pet. at 6, but neither circuit has ever decided this issue. In *Manuel v. United States*, 50 F.3d 1253 (CA4 1995), the Fourth Circuit noted in dicta that *other* courts have awarded punitive damages in maintenance and cure cases,[4] 50 F.3d at 1260, but the issue decided in that case was whether a seaman on a public vessel could bring a maintenance and cure action against a government agent. *Williams v. Kingston Shipping Company, Inc.*, 925 F.2d 721 (CA4 1991), involved only an award of attorney's fees in a maintenance and cure case; unliquidated punitive damages were not mentioned. In *Al-Zawkari v. American Steamship Company*, 871 F.2d 585 (CA6 1989), the Sixth Circuit *denied* a seaman's claim for punitive damages. 871 F.2d at 590 n.8. To the extent that *Al-Zawkari*'s denial of punitive damages could be read as dicta supporting an award of punitive damages in an appropriate case, it is questionable whether the Sixth Circuit would adhere to such a reading today.[5]

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[4] One of the other courts cited was the Fifth Circuit. After the decision below, of course, this statement is no longer accurate.

[5] *Al-Zawkari* was a pre-*Miles* case, and the Sixth Circuit has since taken the lead in applying *Miles* to deny punitive damages

The First[6] and Eleventh[7] Circuits, along with the Alaska Supreme Court,[8] have held that a seaman may recover unliquidated punitive damages in addition to attorney's fees. The cases so holding, however, all predate *Miles*. As explained in Section I. C, *infra*, it appears unlikely that any of these courts would adhere to this view today.

B. No Conflict Exists After *Miles*

Whatever the result found in cases decided before *Miles*, as explained in Section II, *infra*, the Fifth Circuit correctly held that *Miles* compels the denial of punitive damages in the maintenance and cure context. Petitioner cites several post-*Miles* decisions that presumably support a post-*Miles* conflict. Pet. at 8. However, a closer look at the cases cited belies the presence of any relevant conflict. The appellate cases cited are either limited to attorney's fees[9] or involve

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in general maritime law actions. *See Miller v. American President Lines*, 989 F.2d 1450 (CA6 1993). Furthermore, what little support *Al-Zawkari* offers to petitioner is based solely on the citation of two Fifth Circuit cases. *See* 871 F.2d at 590 n.8. Indeed, *Hoeffling v. United States Steel*, 792 F. Supp. 1029 (E.D. Mich. 1991), the pre-*Miller* district court decision cited by petitioner, declares that "[d]icta in [*Al-Zawkari*] appears to indicate that this circuit has adopted the view of the Fifth Circuit on this issue." 792 F. Supp. at 1030. The decision below, of course, makes the Fifth Circuit's current view abundantly clear.

[6] *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (CA1 1973).

[7] *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (CA11 1987).

[8] *Weason v. Harville*, 706 P.2d 306 (Alaska 1985).

[9] *See, e.g., Deisler*, 54 F.3d at 1087; *Neely v. Club Med Management Services*, 63 F.3d 166, 173 (CA3 1995); *Williams*, 925 F.2d at 723.

statements in dicta.[10] Indeed, several of the district court cases are similarly inapplicable. The district court in *McMillan v. Tug Jane A. Bouchard*, 885 F. Supp. 452 (E.D.N.Y. 1995), for example, expressly denied the seaman a recovery of punitive damages beyond his attorney's fees. 885 F. Supp. at 466. Those district court cases cited by petitioner that held punitive damages available in the context of maintenance and cure, with one exception,[11] were from district courts in the Fifth and Ninth Circuits. Pet. at 10 n.39. Their holdings have now been overruled by the decision below and *Glynn*.

C. The Pre-*Miles* Conflict Is Likely to be Resolved Without This Court's Intervention

The pre-*Miles* cases in conflict with the decision below – *Robinson* in the First Circuit, *Hines* in the Eleventh Circuit, and *Weason* in the Alaska Supreme Court – do not create an intolerable conflict. It is reasonable to believe that, given the teachings of *Miles*, each of these courts will fall in line with the majority of the circuits to deny unliquidated punitive damages.

The First Circuit has not reconsidered *Robinson* since *Miles*,[12] but it has applied *Miles* in the punitive damages

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[10] *See, e.g., Manuel*, 50 F.3d at 1260.

[11] *White v. Aviation River Transportation Company*, 853 F. Supp. 300, 301 (S.D. Ill. 1993), is the one exception, and it relied upon two Louisiana district court cases that have since been overruled by the decision below.

[12] Contrary to petitioner's suggestion, Pet. at 8 n.28, *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (CA1 1993), did not endorse *Robinson*, but distinguished it. 984 F.2d at 1284. The *Ellenwood* court neither addressed the issue nor even considered

context under a general maritime law claim. In *Horsley*, the First Circuit held that "[u]nder the analysis prescribed in *Miles* [citations omitted], an admiralty court may not extend the remedies available in an unseaworthiness action under the general maritime law to include punitive damages. . . . " 15 F.3d at 203. This is a clear indication that the First Circuit would likely accept the Fifth Circuit's majority approach the next time it faces this issue in the maintenance and cure context.

The Eleventh Circuit, in deciding *Hines*, forthrightly declared, "We follow [*Complaint of Merry Shipping*, 650 F.2d 622 (CA5 1981)] and a more recently decided case in the Fifth Circuit [*i.e.*, *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (CA5 1984)], . . . " 820 F.2d at 1188; *cf. id.* at 1189 ("We follow the reasoning of the Fifth Circuit . . . . "). Of course, the en banc Fifth Circuit has now recognized that *Merry Shipping* is inconsistent with this Court's subsequent decision in *Miles*, and has explicitly overruled *Holmes*. The entire basis for the Eleventh Circuit's holding is now gone, and it thus seems likely to conclude that the Eleventh Circuit would again follow the Fifth Circuit if the issue were properly before it today.[13]

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the effect of *Miles*. In any event, *Ellenwood* was decided before *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (CA1 1994), which *does* address the impact of *Miles* on a claim of punitive damages under the general maritime law, thus offering far better evidence of the likely course that the First Circuit will take.

[13] Contrary to petitioner's suggestion, Pet. at 8 n.33, *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (CA11 1995), did not endorse *Hines*. The *Flores* court, in denying punitive damages, simply cited *Hines* to show that the seaman had no factual basis for his claim. *See* 47 F.3d at 1127. The court neither addressed the issue here nor considered the effect of *Miles*.

In *Weason*, the Alaska Supreme Court noted that there was a split in the circuits on this issue, and that the Ninth Circuit had left the question unresolved. *See* 706 P.2d at 310. Thus, the *Weason* court followed what was then the majority approach. *Id.* The Alaska courts have not returned to this issue in a reported decision since *Weason*, let alone since *Miles*, but the approach taken in *Weason* suggests that the result would be different today. The Ninth Circuit has now resolved this question in *Glynn*, and the new majority approach in the circuits is to limit damages for the failure to pay maintenance and cure to attorney's fees.

There is not a single decision awarding unliquidated punitive damages in a maintenance and cure case that cannot be traced to *Robinson* and *Holmes*. The Fifth Circuit now has overruled *Holmes*, and *Horsley* offers strong evidence that *Robinson* may suffer the same fate. Because every case upholding unliquidated punitive damages relied upon this now questionable authority, it is likely that the pre-*Miles* conflict will be resolved in the lower courts without any need for this Court's intervention.[14] At the very least, the Court should postpone action to permit this to happen. If the dissenting courts do adhere to their pre-*Miles* views, there will be ample opportunity to review one of these subsequent cases. But in the meantime, the issue should be allowed to percolate so that the

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[14] The Fifth Circuit has long been particularly influential in maritime personal injury cases. Indeed, the influence of the Fifth Circuit in this precise context is evident in the cases on which petitioner relies. A unanimous en banc decision of the Fifth Circuit, such as the decision below, is thus likely to have a major influence in resolving the pre-*Miles* conflict.

lower courts will have a chance to apply *Miles* in this context.

II.

THE FIFTH CIRCUIT IS CORRECT

The unanimous en banc Fifth Circuit properly concluded that a seaman cannot recover unliquidated punitive damages from a shipowner for a failure to pay maintenance and cure. In reaching its decision, the court below recognized that this Court's decisions in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), *Miles*, and *Vaughan v. Atkinson*, 369 U.S. 527 (1962), compel this result. But even if the Court's prior decisions left the issue open, the court below properly held that punitive damages should not be available in a maintenance and cure action as a matter of principle.

A. The Court Below Properly Interpreted *Cortes*, *Miles*, and *Vaughan*

In *Cortes*, a maintenance and cure case, Justice Cardozo, for the Court, considered the case of a seaman who fell ill and died in the service of a vessel. The question was whether the seaman's representative could bring a survival cause of action under the Jones Act because the shipowner had improperly denied maintenance and cure.

> The question then is to what extent the ancient rule has been changed by modern statute [Jones Act].
>
> * * *

> We are to determine whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of the statute.

287 U.S. at 371. The *Cortes* Court determined that the remedies provided by the Jones Act were to be afforded to seamen (or their personal representatives) whose conditions were exacerbated by the shipowner's failure to provide maintenance and cure. The Court made clear that a claim for denial of maintenance and cure encompasses the "negligence" of the shipowner coupled with the "personal injury" of the seaman, therefore the employer's conduct would constitute a tort under the Jones Act. 287 U.S. at 373-374.

The Court in *Miles* considered whether a non-dependent parent of a Jones Act seaman could recover loss of society damages under a general maritime law claim (unseaworthiness) in a wrongful death action. The Court held that non-pecuniary damages could not be recovered in a general maritime law cause of action, and therefore specifically rejected the parent's claims for loss of society. 498 U.S. 33. The Court reasoned that a Jones Act seaman may not recover more expansive remedies under the general maritime law than those sanctioned by Congress pursuant to the express terms of the Jones Act, 46 U.S.C. § 688(a).[15] The Court

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[15] In so holding, the Court stated:

> But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." (citation omitted).

498 U.S. at 31.

reiterated the guiding principle in *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S.Ct. 981, 989 (1994): "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field."

Under *Cortes*, the cause of action for denial of maintenance and cure is cognizable under the Jones Act, thereby subjecting such claims to the damage limitations "Congress must have intended [by incorporating] the pecuniary limitation on damages [of the FELA into the Jones Act]," *Miles*, 498 U.S. at 32-33.[16] The court below correctly determined that logic thus compels the exclusion of punitive damages as a remedy for a denial of maintenance and cure, because although this Court has not ruled on the issue, punitive damages are "rightly classified as non-pecuniary." *See* 59 F.3d at 1506, Pet. at D-24.

> Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.

498 U.S. at 32.

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

498 U.S. at 32-33.

[16] Petitioner cites the Court to several cases for the proposition that punitive damages were considered appropriate pre-Jones Act in the context of seamen's claims. Pet. at 21. Petitioner cites only cases that discuss punitive damages in dicta, Pet. at 22, or to cases in which the courts assessed damages for "aggravation" of the seamen's condition. *See, e.g., Basquall v. City of Carlisle*, 39 F. 807, 816 (C.C.D. Ore. 1889).

Petitioner argues that the decision below, in applying *Miles*, improperly relates a claim for denial of maintenance and cure to a Jones Act claim as closely as this Court would an unseaworthiness action to a Jones Act claim. Pet. at 18. Petitioner confuses a claim for maintenance and cure with a claim for the *denial* of maintenance and cure, and in his efforts to treat the denial of maintenance and cure as a "distant cousin" of the Jones Act, petitioner presumes that there is no "overlap" at all. Pet. at 20. Petitioner's argument fails because in *Cortes* this Court expressly held that a seaman's action for denial of maintenance and cure is cognizable under the Jones Act:

> While the seaman was still alive, his cause of action for personal injury created by the statute [Jones Act] may have overlapped his cause of action for breach of the maritime duty of maintenance and cure, just as it may have overlapped his cause of action for injury caused through an unseaworthy ship.
>
> * * *
>
> The overlapping is no reason for denying to the words of the statute the breadth of meaning and operation that would normally belong to them,
>
> * * *
>
> The failure to furnish cure is a personal injury actionable at the suit of the seaman during life, and at the suit of his personal representative now that he is dead.

Cortes, 287 U.S. at 374-376.

Therefore, while a maintenance and cure claim itself may be a distant cousin, *Cortes* teaches that a denial of the

claim overlaps the Jones Act. Once the "overlap" is found, under the *Miles* uniformity principle, the Jones Act "direct[s] and delimit[s]" the seaman's recovery for a wrongful denial of a claim for maintenance and cure. 498 U.S. at 27.

The Court in *Vaughan* allowed the seaman a recovery of attorney's fees as "damages suffered" resulting from the shipowner's denial of maintenance and cure. 369 U.S. at 531. *Vaughan* is completely in accord with the *Miles* uniformity principle. Therefore, not only is the decision below consistent with this Court's holding in *Vaughan*, it is squarely in accord with the rationale of *Miles*, because the general maritime law cause of action for maintenance and cure is unquestionably reached by the "pecuniary limitation" of the Jones Act. 498 U.S. at 32. MOC readily admits that a seaman may recover his attorney's fees (if a proper claim is made) and damages in aggravation (if proven) for an arbitrary and capricious denial of maintenance and cure.

Petitioner argues that the decision below "[restricts] *Vaughan* to a narrow 'abuse of litigation' remedy. . . . " Pet. at 15. While the court below discussed the "bad faith" exception to the American rule and how subsequent cases have treated the holding in *Vaughan*, the court below did not in any way restrict its holding to post-litigation activity. The court below merely attempted to determine whether the award of attorney's fees in *Vaughan*, even if characterized as "fee shifting," was to be denominated as "compensatory" or "punitive." 59 F.3d at 1503, Pet. at D-15-16. The court's final determination was not to limit the penalty to bad faith abuses of the litigation process. As the court below stated: "Simply put, all

we can confidently say about Vaughan is that it entitles an injured seaman to recover attorney's fees – perhaps as part of compensatory damages – when his employer willfully fails to pay maintenance and cure." 59 F.3d at 1503, Pet. at D-16. This analysis and result are hardly the type of "evisceration" of *Vaughan* that, as petitioner claims, will provide the legal impetus to "force seamen's counsel to rush to court to file suit." Pet. at 29.

B. The Fifth Circuit Did Not Fear "Punitives Rampant," But Adhered to Prevailing Trends

Petitioner argues that the court below ignored longstanding prudential and judicial reasoning in limiting a seaman's recovery of punitive damages, such that petitioner presumes the decision below was based upon an irrational fear of "rampant" punitive damages. Pet. at 25-26. On the contrary, as shown above, the court below utilized the soundest of reasoning in determining that punitive damages are not available to Jones Act seamen in the maintenance and cure context.

Moreover, the decision below, rather than evidencing fear, correctly acknowledges the national trend in this regard. For example, this Court has heard at least four cases in the last five years touching on the propriety of punitive damages and the instances in which they should be recovered.[17] In each opinion, the Court has discussed

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[17] *BMW of North America, Inc. v. Gore*, 640 So. 2d 619, *cert. granted*, 64 U.S.L.W. 3034 (U.S. July 18, 1995) (94-896) (argued on October 11, 1995); *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331 (1994); *TXO Production Corp. v. Alliance Resources*

the need for strict limitations on the imposition of punitive damages. *See, e.g., Honda,* 114 S.Ct. 2331 ("Punitive damages pose an acute danger of arbitrary deprivation of property."). In addition, at last count, 18 states had enacted statutes limiting the availability of or placing caps on the recovery of punitive damages.[18] Congress has drafted legislation designed to limit the imposition of punitive damages,[19] and the Country as a whole is rightly concerned regarding the widespread onset and abuse of punitive damages.[20]

More specifically, since *Miles,* the admiralty courts to have ruled on the matter have almost unanimously held that punitive damages are unavailable to a Jones Act seaman or his survivors under a general maritime unseaworthiness action. *See* 59 F.3d at 1506 n.7, Pet. at D-24. In addition, some admiralty courts have gone further to determine that non-pecuniary damages are

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Corp., 508 U.S. ___, 113 S.Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

[18] *See* Janet Novack, *Torture by Tort*, Forbes, Nov. 6, 1995 at 1380.

[19] *Id.*

[20] Despite petitioner's statements to the contrary, the admiralty bar has not been left out of the punitive barrage. For example, in one maintenance and cure case, in which certiorari was denied by this Court, the defendant shipowner was tagged with a one million dollar punitive award that was remitted by the state appellate court to five hundred thousand dollars. *Jordan v. Intercontinental Bulktank Corp.*, 621 So. 2d 1141 (La. App. 1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 926 (1994).

unavailable to any admiralty plaintiff.[21] Therefore, it is unlikely that the sixteen judges of the Fifth Circuit were duped into their holding because of an irrational fear of "rampant" punitive damages. The more likely explanation is that the Fifth Circuit judges made a rational determination of the law, and considered the status of the national trend in regards to limiting punitive damages.

C. The Denial of Unliquidated Punitive Damages Can Only Quell the Overzealous Advocacy of Counsel to the "Wards of the Court."

Petitioner sails on similarly rough seas when he argues that the denial of unliquidated punitive damages will "foment" litigation. Pet. at 26-30. On the contrary, overzealous advocates for seamen have, since the *Holmes* decision, used the threat of punitive damages not as a foil when shipowners act arbitrarily, but as a sword to increase the value of their cases.[22]

Petitioner further argues that the "newly discovered" course taken by the Fifth Circuit will lead to widespread forum shopping, and will encourage egregious acts on behalf of shipowners, leaving the seamen at the mercy of unscrupulous shipowners. Pet. at 14, 26-27. Petitioner's argument ignores almost twenty years of history. The

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[21] *See, e.g., Wahlstrom v. Kawasaki*, 4 F.3d 1084 (CA2 1993) (negligence-recreational jet skier).

[22] *See, e.g.*, Appendix A at App. 5, Argument of Mr. Harvey Lewis, counsel for the Louisiana Trial Lawyers Association, in regards to the certain "flavor," punitive damages add to his cases. Mr. Lewis is the law partner of Paul M. Sterbcow, whose affidavit is found at Pet. App. G.

Fifth Circuit itself has long been part of the pre-*Miles* "conflict." The en banc decision merely places the Fifth Circuit in line with the Second, Third, and Ninth Circuits, evidencing a change of sides on the issue based upon this Court's subsequent decision in *Miles*. Widespread venue shopping and recalcitrant shipowners were not in evidence in other circuits before the en banc decision, and there is no reason to believe there will be an explosion of such activity after the decision.

The Court is no longer required to offer extraordinary protection to seamen. As aptly noted by the Court in *Miles*, the seamen of today's world no longer need look to the courts for protection, 498 U.S. at 19, and they certainly can no longer be described by using the disparaging (yet apparently endearing) terms of the admiralty courts of Justice Story. The "poor and friendless" seaman, with "habits of gross indulgence, carelessness, and improvidence,"[23] now most often can be seen as a union member with excellent benefits and a salary well in excess of the U.S. national average.

Moreover, the threat of unliquidated punitive damages is not necessary to deter a prudent shipowner from treating its employees arbitrarily. As shown by *Williams*, the damages for the aggravation of a seaman's condition and attorney's fees should be sufficient deterrence to "egregious" and "recalcitrant" shipowners. The shipowner in *Williams* was held liable for an additional $150,000.00 in aggravation damages and approximately 75% of the seaman's attorney's fees, even though the

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[23] *Harden v. Gordon*, 11 F. Cas. 480, 482-83 (C.C.D. Me. 1823).

seaman unsuccessfully prosecuted both a Jones Act and an unseaworthiness claim in addition to his maintenance and cure action. 925 F.2d at 722, 726. In short, the Fifth Circuit reached the correct decision regardless of whether *Miles* compels the result, and none of the prudential arguments made by petitioner provide a valid justification for reversal.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

App. 1

NO. 92-4711

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DOMINGO GUEVARA,

PLAINTIFF-APPELLEE

VERSUS

MARITIME OVERSEAS CORPORATION,

DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

STATEMENT OF FACTS

EN BANC HEARING

VOLUME I

* * *

MR. LEWIS: Your Honor, may it please the court, my French is not nearly as good as my good friend Mr. Gelpi's, I guess because I was born and raised in Houston, so you'll forgive me. I represent or my group represents the folks who work on the amicus vessels that opposes [sic] in this argument.

I would like very briefly to try to provide some history. The punitive damage remedy under the general maritime law, Judge Barksdale, dates back to 1818 with the Amible Nancy. It's been carried through consistently to the modern day in a series of cases, including this case decision most recently in P & E Boat Rentals. I think six circuits considered the abstract proposition of punitive damages are recognized as recoverable under the general maritime law. The interesting thing about that is that there's yet to be a single federal appellate case, since 1880, where an award of punitive damages, except in the context of maintenance and cure, has ever been affirmed. The only time in this court's history that the issue of punitive damages, under the general maritime law has ever been before the court was in P & E Boat Rentals, I believe an '89 decision. And in this court, like every other circuit court, said under the facts of that case punitive damages were not recoverable.

Now, in contrast, starting with Holmes and ignoring the Gaspard for a moment, on nine different occasions this court has had a chance to consider and affirm cases awarding damages, punitive damages, for failure to pay maintenance and cure. That gives you some idea of the relative importance in having the remedy available. If

you will, the sort of (unintelligible) to be able to respond to a situation where a ship owner callously disregards his obligation under the general maritime law.

So my first proposition, briefly, is that the general maritime law provides a punitive damage remedy in those instances where you have obligations created by the general maritime law, specifically the obligation to pay maintenance and cure and that obligation is ignored.

I should mention to the court, I should have said from the outset I waive my time and please interrupt me with any question. Forgive me, your honors, for not doing so.

JUDGE GARWOOD: How do you account account [sic] that it's so important for maintenance and cure that there be punitive damages that it's not until 1973, almost two centuries after we had American courts award maintenance and cure that anybody awarded it?

MR. LEWIS: I'm glad you asked that question, Judge Garwood. The answer to that, I think, is a function of the fact that in '73 the public health service hospitals were closed and the – ?

JUDGE GARWOOD: Were there public health service hospitals in 1900?

MR. LEWIS: Sir? Yes, sir, there were. But what I'm saying is during the time that they were functioning it was a simple question for a master to get a certificate for a seaman to go and get treatment. That avenue was readily available. When Congress shut down the public health service hospital and left the seaman and his employer to the private sector, that created problems; and

consequently it was after that that the problem began to crop up where employers just ignored their obligations and there was not a readily available source, and I think that probably is the major explanation why the problem did not become as pronounced as it did until later, Judge.

JUDGE GARWOOD: Justice Story's opinion put out in 1818 and so on, his descriptions of maintenance and cure, the riders, do they talk about punitive damages?

MR. LEWIS: No, sir. And I think also I should have included in the fact that up until the seventies you're pretty much dealing with union contracts, unionized seamen and –

JUDGE GARWOOD: Sure. They're not back in the great depression.

MR. LEWIS: No. No. No. Not back then but –

JUDGE GARWOOD: You're worshiping at the altar of this ancient maritime remedy and I'm just wondering what's on the altar.

MR. LEWIS: That's a good question, Your Honor, my suggestion – it would be difficult for me to support the fact that seamen in the seventies and since have simply become more irresponsible but the fact is that's what the jurisprudence demonstrates. Now, why that is true, I can't say, but –

JUDGE GARWOOD: So you've got to start getting jury's [sic] in these cases for the Jones Act case?

MR. LEWIS: Well, whatever mischief your honor feels that the jury may inject into the system the courts

manage to clear up because the awards haven't been affirmed.

JUDGE GARWOOD: It's specific to counsel, isn't it, to bring a punitive damage, failure to pay maintenance claim when he's trying a Jones Act case at the same time?

MR. LEWIS: Judge, I'm delighted when my opponent neglects to pay my client's medical expenses whether I try my case to a judge or a jury. I think it does add a flavor. But I'm satisfied that the same system has prevailed, that if there is any inappropriate response by the jury, the appellate court will straighten it out. That doesn't mean that the underlying remedy should be ignored.

I, too, share the conviction that the Jones Act is not the polar star that guides this court's determination. If the court has to read Miles in a way that dictates consideration of jurisprudence, the appropriate legislation's been referred to, but I'd like to address the question that Judge King asked and that is: Look, if the seaman has a potential Cortez [sic] type Jones Act remedy, and if the court would permit me, two things have to coalesce for that to occur. Number one, there has to be an injury or illness caused by negligence; and, two, the injury has to be increased or affected by the negligent failure to provide that cure.

I have serious misgivings that a ship owner who is guilty of intentional, arbitrary and capricious conduct, that this in effect, this intentional conduct, may not constitute negligence, so we need to have a situation where there is a third level of remedy. There's also a situation that may exist that where the injury is not aggravated, it's

just this poor man suffers in his condition and he doesn't get the appropriate care, and medical science cannot come in and say, well, the failure to pay this man's medical care made him any worse. Now, I grant you he had to suffer longer but that may be a very difficult thing to prove. But the basic proposition is it may be that the intentional act falls outside of the Jones Act.

JUDGE KING: Well, that's certainly how it will be presented.

MR. LEWIS: Oh, indeed. No question about that.

JUDGE KING: And, you know, no one has said anything about American Dredging and about the concept of harmonizing all of this. If we buy your proposition, no one's going to say that his situation has been exacerbated by the failure to provide cure, by the willful failure to provide cure. We're gonna say that this is – we're really going to look to the maintenance and cure situation and we're going to say we're going to have punitive damages for this. So what we're talking about is sort of coming in by the back door, when what you've really got is a situation where you're trying to get punitive damages for a Jones Act claim.

MR. LEWIS: No, ma'am, what I'm saying is we may not have a Jones Act claim at all.

JUDGE KING: Well, I know, that's exactly what you're gonna say; but what I'm saying is, is this a case of which, you know, which hole you pigeon it into, and it makes all kinds of creative pleading possible to vary the result of a situation that – really that ought not to be in this set-up.

MR. LEWIS: Will my client be entitled, Judge, to recover maintenance and cure until he – until the end of his medical treatment, which may well extend beyond the maximum recovery point of view, which is the cut-off for maintenance and cure but not the cut-off for Jones Act liability? Are my opponents going to pay my attorneys' fees if my client succeeds in the Jones Act claim?

I think that to accept the thesis that this issue is driven by the Jones Act invites a lot of problems and possibilities and concerns that disturb the existing harmony of the maritime law.

I believe my time is up and I thank the court.

JUDGE HIGGINBOTHAM: What is your example of a claim for denial of maintenance and cure that does not in spark [sic] a Jones Act claim?

MR. LEWIS: A seaman catches pneumonia in the middle of a voyage.

JUDGE HIGGINBOTHAM: You disagree with your –

MR. LEWIS: Indeed I do. Indeed I do. I think there are many, many instances where you can, and are entitled to maintenance and cure for injuries – or let's take illnesses that have nothing to do with negligence.

JUDGE GARWOOD: You don't think that – I thought Cordozo [sic] said in Cortez [sic] that it was a tort of which you could recover under the Jones Act if you didn't pay the maintenance without regard to whether the underlying obligation for the maintenance or cure arose from a negligent act or not.

MR. LEWIS: Judge Garwood, as I appreciate the court's opinion in Cortez [sic], it presupposes an unreasonable failure to provide cure that results in an increased injury because of the deprived medical care.

JUDGE GARWOOD: I'm with you entirely there, but I did not read into Cortez [sic] a requirement that the occasion for medical care had arisen out of itself tortious conduct.

MR. LEWIS: I agree with that, Your Honor. I think you're absolutely right in that regard.

JUDGE GARWOOD: If you do agree with me then your answer to Judge Higginbotham's question doesn't follow.

MR. LEWIS: No, sir, what I said was you're in the middle of a voyage and you catch pneumonia, you get maintenance and cure. If the medical care is cut off unreasonably and the condition progresses to the other lung and it causes death then I've got a Cortez [sic] type of medical care case.

JUDGE GARWOOD: Even though your underlying cause was of pneumonia wasn't per se an act under the Jones Act.

MR. LEWIS: That's true. I could not have filed a Jones Act case because I caught pneumonia.

JUDGE GARWOOD: But you can still file a Cortez [sic] case.

MR. LEWIS: If it progresses as a result of the delay, unreasonable failure to provide that care, yes, sir.

JUDGE HIGGINBOTHAM: What's your example of a claim for willful failure to pay maintenance and cure that does not implicate the Jones Act?

MR. LEWIS: Your Honor, that gets back to the answer I tried to give Judge King and that is that if the employer simply says "we're not gonna pay medical expenses at all, period, we just don't think we owe it, that man wasn't even on our vessel, he doesn't show on our crew list." Now, I suggest to you that an argument can and will be made that there's no negligence there. We just absolutely, arbitrarily said "we are not going to pay maintenance and cure, period." Now, I have a difficult time, I concede, Your Honor, escalating past unreasonableness to arbitrating – to get to arbitrariness without going through unreasonableness, but I think indeed it is possible in the case of intentional denial of maintenance and cure.

JUDGE GARWOOD: An intentional tort on the seaman by the master of the vessel is not covered by the Jones Act, is it?

MR. LEWIS: I'm sorry?

JUDGE GARWOOD: An intentional.

MR. LEWIS: I'm sorry, your Honor, I couldn't hear you.

JUDGE GARWOOD: An intentional tort committed on the seaman. If the master of the vessel beats him on the head to get him to do something.

MR. LEWIS: I don't believe so. I don't. It could not be couched as an intentional tort. I would not, if I were pleading and arguing that case to the jury, would not suggest that it was an intentional tort. I have misgivings

that intentional torts are necessarily covered by the Jones Act but I don't know of a case on that point one way or another, Judge Garwood. I can't cite you precedent for either side of that proposition.

JUDGE POLITZ: Thank you, counsel.

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